Before The
Federal Communications Commission
Washington, DC 20554

Comments In Regard To MB-Docket 04-232
By
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The proposal to require all radio and television stations to record all programming broadcast between 6am and 10pm daily and maintain the recordings for a period of 60-90 days is regulatory overkill of the worst kind.

First, why exactly does the Commission think that this across-the-board recording requirement will assist it in any significant way? In the Notice of Apparent Liability the Commission acknowledges that the lack of a recording resulted in the dismissal of complaints in only 169 of a total of 14,379 instances from 2000-2002. See Footnote 8 to the NPRM. That's only 1% of the time, over a three-year period! So even if the proposed recording requirement had been in place during that time period, it would have influenced a very small handful of cases. How does that justify the imposition, on all broadcasters, of this recording requirement?

The proposed requirement is supposedly intended to assist in the enforcement of the prohibition against broadcast indecency. And perhaps it might, if the Commission had any reason to believe that all broadcasters are equally likely to violate that prohibition. But the Commission cannot reasonably believe that, because its own records demonstrate that violations, or alleged violations, of the indecency prohibition have been limited to a relatively small handful of licensees among the thousands of broadcast licensees currently operating stations. And it appears to this observer, at least, that the two entities most often alleged (or proven) to have broadcast indecency – i.e., Clear Channel and Infinity – have already "gotten the message." These two giants have made top-to-bottom changes in their respective approaches to radio audiences since first being chided from the Commission's Bully Pulpit. Why then does it make any sense for the FCC to saddle all other broadcasters (who have consistently taken the high road) with senseless, wasteful labor and expense?

And make no mistake, the labor and expense involved here would be considerable. Licensees would have to acquire and install equipment capable of recording hours of programming, seven days a week, 52 weeks a year, without fail. That alone is likely to involve substantial expense. But over and above that are the costs of maintenance and operation, the cost of the recording medium itself and the cost of storage: whether the recordings be on reel-to-reel tape, or cassettes, or disks, or hard-drives, or some other medium, keeping 1,000-1,500 hours' worth of recorded programming on hand,

catalogued, and available for immediate retrieval will entail substantial investment of cash and diligent, on-going effort.

And to those who would say the cost of recording and preserving would only be nominal, I would remind the Commission of its conclusion ten years ago that every radio station in America could afford a $600.00 EAS system. As it turned out, the cost, with all required modifications to-date is now more than $3,000.00, and these devices will probably be discarded or completely redesigned still another time as a result of a current FCC rule-making. The developers and manufacturers of recording devices certainly don't need another economic stimulus at the expense of the broadcast industry.

In addition to those obvious costs, there are a number of less obvious but no less ominous costs. Mandatory taping will open the very real possibility of fervid witch hunts as interested parties seek evidence not only of indecency, but also of slander, or trademark infringement, or copyright infringement, or political broadcasting violations, or any of a variety of other arguably tortuous conduct. And what about ardent competitors who are likely to try to use this newly found convenience to check one another's ads for pricing and terms?

Even if the Commission itself does not mandate the general availability of these tapes through, e.g., the local public inspection file process, the existence of the tapes will almost certainly give rise to efforts to gain access to those tapes through the civil courts. So even if broadcasters are not required by the FCC to provide listening-rooms for public opportunists to sit while drinking coffee, eating Krispy Kremes, and listening to tapes, public availability of the recordings is likely to be sought through one forum or another. The Commission, even if it wanted to, could not protect broadcasters from these unintended consequences, as only Congress can provide the requisite safeguards to limit access to the tapes to only the FCC, without a corresponding right of access by the general public.

But there are no such safeguards on the horizon, because this taping proposal was not mandated, or even (as far as I am aware) formally suggested by Congress. Rather, it is an idea, which sprang, without notice, from the Commission.

And finally, it is important to recognize that mandatory recording would have a serious, chilling effect on the exercise of the First Amendment right to free speech. How free is broadcast speech likely to be if the speaker knows that his or her speech is being recorded, at the direction of the government, for possible use by a governmental prosecutor? The none-too-subtle *in terrorem* effect produced by the mere existence of the recording requirement flies in the face of the First Amendment.

Please protect America's civil liberties from the civil libertarians. In this package, the consequences far outweigh the benefits. Leave well enough alone.